KANDUPILLAI KRISHNAN

v.

TIMBALAN MENTERI DALAM NEGERI, MALAYSIA & ORS

HIGH COURT MALAYA, KUALA LUMPUR
HELILIAH MOHD YUSOF J
[CRIMINAL APPLICATION NO: 44-34-2003]
12 SEPTEMBER 2003

PREVENTIVE DETENTION: *Detention - Whether lawful - Application for habeas corpus - Whether writ to issue - Emergency (Public Order & Prevention of Crime) Ordinance 1969, ss. 3(3), 4(1)*

PREVENTIVE DETENTION: *Detention order - Validity - Detention under Emergency (Public Order & Prevention of Crime) Ordinance 1969 - Words in detention Order did not strictly follow words in Ordinance - Whether Order ex facie defective - Whether Minister addressed mind to both limbs of s. 4(1) thereof - Failure to consider criminal prosecution - Whether order bad in law - Allegations of fact - Remoteness - Whether time gap duly explained by Minister - Whether going to sufficiency of facts - Emergency (Public Order & Prevention of Crime) Ordinance 1969, ss. 3(3), 4(1), 7C, 7D*

The applicant was detained pursuant to a detention order dated 7 March 2002 ('the order') issued by the Deputy Minister of Home Affairs ('the Minister') under s. 4(1) of the Emergency (Public Order and Prevention of Crime) Ordinance 1969 ('the Ordinance'). In his application for a writ of habeas corpus, the applicant sought to challenge the validity of the order on the grounds, *inter alia*, that: (i) the order was vague and did not provide the basis for a detention under the Ordinance as the words employed by the Minister therein, upon which the Minister founded his satisfaction as to the necessity of the order, namely "with the object of preventing him from committing acts of crime involving violence", were not the actual words appearing in the two limbs of s. 4(1); (ii) there was a failure on the part of the Minister, as the detaining authority, to consider criminal prosecution before resorting to preventive detention; and (iii) there was staleness of the allegations of fact upon which the grounds of detention were constituted.

It was not in dispute that the order did not strictly follow the words or phrases as used in s. 4(1) of the Ordinance, or that there was a gap of about two years between the alleged criminal activities of the applicant, upon which the order was grounded, and the date of the order. The delay notwithstanding, the

Minister, in his affidavit, had explained the time gap by adverting to the fact that, notwithstanding that the criminal activities had started in 1999, the police had only managed to locate and arrest the applicant on 7 January 2002, and further that, the police also required time to investigate in detail whether the applicant had been truly involved in criminal activities involving violence. Before the learned judge, the primary question that arose was whether the order could in law be said to be *ex facie* defective, and hence whether a writ of *habeas corpus* applied herein ought to issue.

Held:

[1] In considering the order, the court has to ascertain whether on the face of it the order was so vague such that it could be said that the Minister had not applied his mind properly to the particular circumstances of the case or that he had exercised his power of detention mechanically. However, notwithstanding the necessity to so ascertain, there is nothing in the Ordinance that requires that the detention order should be in any particular form. (p 541 e-f)

[2] The structure and syntax of the provisions of s. 4 is such that it is not necessary that the detention order be crafted in such a way that it has to literally repeat word for word what is in the section. The test is whether, on the face of it, the words are such that it could be conveyed to the detenu which part of the limb is being invoked. Here, the order, as crafted and served on the detenu, is capable of being understood as to which part of the second limb is being referred to. (p 542 a-b)

[2a] The test of determining whether the Minister had not applied his mind mechanically is further to be ascertained from the grounds of detention which was furnished. The allegations of facts set out in the grounds herein disclosed that the detenu, over the period that stretched from February 1999 to February 2000, had been engaged alongside others in acts using force (deploying 'kayu hoki, parang, besi, topi keledar') to inflict serious injury on certain individuals. These acts indicate that there was use of force which could be described as violent. It follows therefore that the allegations of fact upon which the grounds were constituted bear the stamp of violence. The description of those alleged facts are also specific enough as to be understood as acts falling within the scope of the second part of the second limb of s. 4(1) of the Ordinance and are not in contradiction with the order. (p 542 c-e)

[3] Some delay in taking action in cases of preventive detention may be inevitable. In any case, on the issue of the remoteness that was alleged of the criminal activities, the Minister has explained the reason for the delay. In view of the explanation, it cannot be said that there was insufficiency of material for subjective satisfaction or that it was not genuinely reached. It may be added, however, that with the inception of s. 7C and 7D of the Ordinance, the court would be enjoined from embarking into further inquiry on the adequacy or otherwise of the reasons given by the Minister. (p 551 e-g)

[4] The possibility of launching a criminal prosecution cannot be said to be a bar to an order of preventive detention. Nor would it be correct to say that if such possibility is not present in the mind of the detaining authority the order of detention would necessarily be bad. Further, counsel's argument in this respect may also lead to the situation that another precondition has to be stipulated, namely, that the detaining authority is to furnish a further ground that it is satisfied that criminal prosecution has been considered and determined to be not feasible. This is an invitation to the court to rewrite the legislation in substance and to inquire into investigation papers. In the circumstances, the court can only conclude that the order is not only not defective *ex facie* but also not invalid. (p 556 e & 560 h)

[Detention order not defective or invalid; writ refused.]

Case(s) referred to:

Abdul Rahman Maidin v. Timbalan Menteri Dalam Negeri Malaysia & Ors [2003] 3 CLJ 8 CA ***(foll)***

Chua Teck v. Menteri Hal Ehwal Dalam Negeri [1990] 1 MLJ 104 ***(refd)***

Dorai Manickam v. R [1936] MLJ 261 ***(refd)***

Karam Singh v. Menteri Hal Ehwal Dalam Negeri Malaysia [1969] 2 MLJ 129 ***(refd)***

Hemlata Kautilah Shah v. State of Maharastra & Anor [1982] SCC (Cri) 16 ***(dist)***

Lim Thian Hok v. Minister of Home Affairs & Anor And Other Applications [1993] 1 MLJ 214 ***(refd)***

Liversidge v. Anderson [1942] AC 206 ***(refd)***

M Mohd Sulthan v. Jr Secy to Govt of India Finance Dept [1990] AIR SC 2222 ***(refd)***

Menteri Hal Ehwal Dalam Negeri & Anor v. Lee Gee Lam And Another Application [1993] 4 CLJ 336 SC ***(refd)***

Minister For Home Affairs, Malaysia & Anor v. Karpal Singh [1988] 3 MLJ 29 ***(refd)***

Mohd Ezam Mohd Noor v. Ketua Polis Negara And Other Appeals [2002] 4 CLJ 309 FC ***(refd)***
Morgan Perumal v. K/I Hussein Abdul Majid & Ors [1998] 3 CLJ 629 CA ***(dist)***
Murugan Palannisamy & Ors v. Deputy Minister of Home Affairs & Ors [2000] 1 CLJ 147 ***(dist)***
R v. Halliday ex p Zadig [1917] AC 260 ***(refd)***
State of Punjab v. Sukhpal Singh [1990] AIR 225 ***(refd)***
Yeap Hock Seng v. Minister for Home Affairs Malaysia & Ors [1975] 2 MLJ 279 ***(refd)***
Yit Hon Kit v. Minister of Home Affairs, Malaysia & Anor [1988] 2 MLJ 638 ***(dist)***

Legislation referred to:
Emergency (Public Order & Prevention of Crime Ordinance 1969, ss. 3(3)(c), 4(1), 7C, 7D
Federal Constitution, arts. 5(2), 22(5), 151
Internal Security Act 1960, s. 8

Conservation of Foreign Exchange and Prevention of Smuggling Activities Act 1974 [India], s. 3(1)

For the applicant - N Sivananthan; M/s Sivananthan
For the respondents - Azlinda Rasdi (Abdul Rani Kasim) DPP

Reported by WA Sharif

JUDGMENT

Heliliah Mohd Yusof J:
This is an application for a writ of *habeas corpus*. The applicant or detenu is the subject of a detention order made by the Minister of Home Affairs dated 7 March 2002 pursuant to provisions of sub-s. 4(1) of the Emergency (Public Order & Prevention of Crime) Ordinance 1969 (hereinafter referred to as Ord. No. 5/69)).

The affidavit filed in support of the application for the detenu had stated several grounds for challenging the Ministerial order. On the date of the hearing 15 August 2003 learned counsel for the detenue identified two enclosures namely encl. 11 and encl. 6 respectively for purposes of advancing the arguments for challenging the Ministerial order for detention. Enclosure 11 is the affidavit filed in reply by the Pemangku Assisten Komisioner Polis II Abd. Rahim b. Hj. Hanafi dated 15 July 2003 while encl. 6 relates to the affidavit filed in opposition to the application by the Hon. Deputy Minister of Home Affairs Dato' Hj. Zainal Abidin bin Zin also dated 15 July 2003.

Before addressing the three arguments of the learned counsel for the detenu it is useful to set out the relevant provisions of s. 4 Ord. 5/1969 which are as follows:

> **4. Power to order detention**
>
> (1) If the Minister is satisfied that with a view to preventing any person from acting in any manner prejudicial to public order it is necessary that that person should be detained, or that it is necessary for the suppression of violence or the prevention of crimes involving violence that that person should be detained, the Minister shall make an order (hereinafter referred to as a "detention order") directing that that person be detained for any period not exceeding two years.
>
> (2) ...
>
> (3) ...
>
> (4) Whenever any person is detained under a detention order he shall, in accordance with Article 151 of the Constitution, as soon as may be:
>
> (a) be informed of the grounds of this detention.
>
> (b) subject to Clause 3 of the said Article (which provides that no authority may be required to disclose facts whose disclosure would in its opinion be against the national interest) be informed of the allegations of fact on which the order is based; and
>
> (c) be given the opportunity of making representations against the order as soon as may be.

The first argument raised by counsel for the applicant is with regard to the submission of the report to the Minister that has been stated in para. 3 of encl. 11. That paragraph states:

> 3. Saya adalah Pegawai Polis yang ditetapkan oleh Ketua Polis Negara di bawah Seksyen 3(3)(c) Ordinan Darurat (Ketenteraman Awam dan Mencegah Jenayah) 1969, kemudian ini disebut Ordinan tersebut sebagai pegawai yang ditetapkan untuk menerima laporan hal penangkapan dan penahanan orang yang ditangkap di bawah Seksyen 3 Ordinan tersebut dan melaporkan hal penangkapan dan penahanan tersebut kepada Menteri Dalam Negeri, Malaysia.

The relevant parts of s. 3 of Ord. 5/1969 states:

3. Power to detain suspected persons.

(1) Any police officer may without warrant arrest and detain pending enquiries any person in respect of whom he has reason to believe that there are grounds which would justify his detention under section 4(1).

(2) Any police officer may without warrant arrest and detain pending enquiries any person who on being questioned by him fails to satisfy him as to his identity or as to the purpose for which he is in the place where he is found, if the police officer suspects that person of having acted or being about to act or being likely to act in any manner prejudicial to public order or if he has reason to believe that it is necessary for the suppression of violence or the prevention of crimes involving that that person should be detained.

(3) Any person arrested and detained under this section may be detained in police custody for a period not exceeding sixty-days without an order of detention having been made in respect of him under section 4(1):

Provided that:

(a) he shall not be detained for more than twenty-four hours except with the authority of a police officer of or above the rank of Inspector;

(b) he shall not be detained for more than forty-eight hours except with the authority of a police officer of or above the rank of Assistant Superintendent;

(c) he shall not be detained for more than thirty days unless a police officer of or above the rank of Deputy Superintendent has reported the circumstances of the arrest and detention to the Inspector-General of Police or to a police officer designated by the Inspector-General in that behalf and the Inspector-General or the police officer so designated by him, as the case may **be, shall** forthwith **report the same to the Minister.** (emphasis added)

According to the counsel while the Acting Senior Asst. Commissioner had stated that the report had been submitted to the Minister, he alleged that there was, what he referred to as a "gap" which was in contravention of s. 3(3)(c) of Ordinance 69. The "gap" is alleged to have been seen arisen on the ground that if the Minister had received the report it was not explained or disclosed how the Deputy Minister could have received the report from the Minister since the Deputy Minister himself had deposed in his affidavit to oppose the application as follows:

(Enclosure 6 – para 5)

5. Pada 5.2.2002 saya telah menerima laporan hal keadaan penangkapan dan penahanan terhadap Pemohon daripada pegawai yang ditetapkan di bawah Seksyen 3(3)(c) Ordinan tersebut iaitu Pemangku Senior Assisten Komissioner Polis II Abdul Rahim bin Hj. Hanafi.

Counsel in his submission has accepted that the Deputy Minister is vested with the powers of the Minister.

The question is whether there has occurred a gap which has resulted in the provision of s. 3(3)(c) of the Ord. 5/1969 being contravened.

The word "Minister" is not defined in the Ordinance 5/69. The Interpretation Acts 1948 and 1967 (Act 388) of the Laws of Malaysia in section of Division One contains the definition *inter alia* of the word "Minister". The word is defined as follows:

"Minister" means, subject to section 8(2), a Minister of the Government of Malaysia (including the Prime Minister and a Deputy Minister).

Sub-section 8(2) of the same Act states as follows:

2. A reference to "the Minister" is a reference to the Minister for the time being responsible for the matter in connection with which the reference is made.

The provisions mentioned above which are already complementary to art. 43A of the Federal Constitution are further bolstered by the Ministerial Functions Order PUA 35/2000 which ascribes to the Minister and two Deputy Ministers responsible for Home Affairs who are identified by name therein, to be responsible for matters which include public order and internal security, criminal investigations and detention.

With such statutory provisions vested on the Deputy Minister, I find that the contention of the learned counsel is, with due respect, opinionated. The reference to the Minister in the affidavit is just a general reference to the Minister who is responsible for the time being in the Ministry. But if this suggests that it must be shown procedurally that the Minister, upon receiving the report has in turn to send it to the Deputy Minister before the Deputy Minister could issue a detention order, or that the Minister or Deputy Minister must be personally identified by name, is to my mind too far fetched. In fact, it invites bureaucratic, red taping procedures especially when the Federal Constitution itself has stipulated a certain time to be observed as a precondition leading to

the issuance of the order. I find therefore that the first issue raised that there is a gap in contravention of s. 3(3)(c) of the Ord. 5/69 is groundless. In any case, this very same point has already been the subject of judicial determination in *Nadarajan v. Timbalan Menteri Hal Ehwal Dalam Negeri Malaysia* [1994] 2 MLJ 657. No appeal seems to have been made on the matter.

The second argument raised by the learned counsel for the detenu pertains to the detention order itself which was signed and issued by the Deputy Minster dated 7 March 2002 and referred to in the affidavit in support of the application. The relevant portion of the order and the grounds and allegation of facts which constituted the basis of the detention order and which have been challenged are as reproduced below:

ORDINAN DARURAT (KETENTERAMAN AWAM DAN MENCEGAH JENAYAH), 1969
PERINTAH TAHANAN
[Seksyen 4(1)]

Kepada:

Penguasa xxxxxxx
Pusat Pemulihan Akhlak,
Simpang Rengam, Johor

Ketua Polis Negara,
Bukit Aman – 50560 KUALA LUMPUR

Semua Pegawai Polis Diraja Malaysia yang berkenaan.

BAHAWASANYA saya, xxx berpuashati yang Perintah ini adalah perlu dibuat ke atas orang yang namanya tersebut di bawah ini dengan tujuan hendak mencegah beliau daripada melakukan perbuatan xxx jenayah yang melibatkan kekerasan.

Nama	Nombor Kad Pengenalan
KANDUPILLAI A/L KRISHNAN	721221-14-5685

ALASAN-ALASAN DIMANA PERINTAH TAHANAN DIBUAT
Kamu adalah seorang ahli kumpulan penjenayah yang telah melakukan kegiatan jenayah yang melibatkan kekerasan.

TUDUHAN-TUDUHAN YANG PERINTAH ITU BERASASKAN
Bahawa kamu adalah seorang ahli kumpulan penjenayah yang telah melakukan kegiatan jenayah yang melibatkan kekerasan dan bergiat cergas di sekitar kawasan Sri Manja, Kg Sentosa Sepakat, Taman Kanagapuram, Jalan Klang Lama dan Rumah Panjang Kawasan 'C', Pantai Dalam, Kuala Lumpur. Antara kegiatan jenayah yang telah kamu lakukan ialah:

1. Bahawa kamu dalam bulan Februari 1999, lebih kurang 2.30 petang di kawasan Sri Manja, Jalan Klang Lama, Petaling Jaya bersama beberapa orang ahli kumpulan kamu dengan bersenjatakan parang telah bergaduh dengan kumpulan lawan untuk merebut kawasan pengedaran dadah dan dalam pergaduhan itu kamu bersama ahli kumpulan kamu telah menyerang dan menetak seorang ahli kumpulan lawan sehingga ia mendapat cedera parah di tangan kanannya.

2. Bahawa kamu pada 23.9.1999, lebih kurang jam 12.30 tengahari di sebuah kedai motorsikal di Kg Sentosa Sepakat, Jalan Klang Lama kamu bersama dua orang ahli kumpulan dengan menggunakan kayu hoki telah menyerang dan memukul seorang mangsa. Akibat serangan itu, tulang lengan tangan kiri dan kanan mangsa patah serta tissu kepala rosak.

3. Bahawa kamu pada 23.9.1999, lebih kurang jam 2.30 petang bertempat disebuah kedai makan Taman Kanagapuram, Jalan Klang Lama, Petaling Jaya bersama dua orang ahli kumpulan kamu dengan rnenggunakan kayu hoki telah menyerang dan memukul mangsa. Akibat pukulan itu, mangsa mendapat 10 jahitan di kepala dan cedera di bahagian kedua-dua tangan.

4. Bahawa kamu pada 12.2.2000, lebih kurang jam 4.30 petang bertempat di hadapan rumah No. 7, Blok 23, Rumah Panjang Kawasan 'C', Pantai Dalam, Kuala Lumpur bersama beberapa orang ahli kumpulan kamu dengan menggunakan parang, besi, kayu dan topi keledar telah menyerang tiga orang mangsa. Akibat dari serangan tersebut, dua orang mangsa telah mendapat kecederaan di bahagian muka, kepala dan lebam seluruh badan.

5. Bahawa kamu pada 12.2.2000, lebih kurang jam 5.20 petang bertempat di Blok 69, Rumah Panjang Kawasan 'C', Pantai Dalam, Kuala Lumpur bersama beberapa orang ahli kumpulan kamu dengan bersenjatakan parang telah cuba memecahkan rumah seorang mangsa dan mengugut akan membakar rumah mangsa jika tidak membuka pintu rumah. Kamu dan anggota kumpulan telah merosakkan sebuah motorsikal kepunyaan mangsa dan telah menyiram petrol untuk membakar motosikal itu tetapi telah dihalang oleh penduduk Blok 69 kawasan perumahan berkenaan.

Dengan Arahan
Timbalan Menteri Dalam Negeri

t.t.
(MASILA BINTI YA'KUB)
Penolong Setiausaha
Kementerian Dalam Negeri

Tarikh : 7 Mac 2002

It is to be further noted however that the exact words challenged by the detain are the following words in the order that is:

> ... dengan tujuan hendak mencegah beliau daripada melakukan perbuatan jenayah yang melibatkan kekerasan.

According to the learned counsel for the detenu with the deletion of certain words in the order, the effect is that the order of detention is no longer supported by the provisions of the s. 4 of the Ordinance 1969.

It is alleged that the Deputy Minister in giving the order had used some of the words in the first limb and some of the words in the second limb of s. 4(1) of the 1969 Ordinance. For the purposes of this argument learned counsel has referred to the oft cited decision of the Supreme Court, then, in the case of *Menteri Hal Ehwal Dalam Negeri & Anor v. Lee Gee Lam and Anor Application* [1993] 4 CLJ 336. This case is helpful in clarifying the purport of the said s. 4(1). But first there is a need to state the relevant portion of the judgment where his lordship LC Vohrah J (as he then was) summed up by observing (at p. 339).

> ... in determining the propriety or legality of a detention order made under s. 4(1) the satisfaction of the Minister has to be considered in the light of the limbs under which he acted. The determination of the question as to whether he addressed his mind to the relevant limb or for that matter to both the limbs in making his detention order is a procedural matter and if it is shown that there is some doubt as to which particular limb the Minister applied his mind to or whether he applied his mind to both the limbs together in grounding his order, the benefit of the doubt must be given to the detenu.

As explained in *Lee Gee Lam*'s case as well as the decision of the Court of Appeal in *Morgan a/l Perumal v. K/I Hussein b. Abdul Majid & Ors.* [1998] 3 CLJ 629 (at p. 633) his lordship Justice Shaik Daud JCA (as he then was) said:

> The main ground of this appeal is that the detention is invalid, in that on the face of it, the order is vague as to whether the Deputy Minister had actually applied his mind to the particular circumstances of the case or whether he had exercised his powers of detention mechanically. Section 4(1) of the Ordinance provides that:
>
> > If the Minister is satisfied that with a view to preventing any person from acting in any manner prejudicial to public order it is necessary that that person should be detained, or that it is necessary for the suppression of violence or the prevention of crimes involving violence that that person should be detained, the Minister shall make an order (hereinafter referred to as a 'detention order') directing that that person be detained for any period not exceeding two years.

On a true reading of s. 4(1) above, it seems clear that there are two distinct limbs, namely:

(a) a person who has acted in any manner prejudicial to public order; and

(b) a person, if it is necessary for the suppression of violence or the prevention of crimes involving violence.

It is clear that the legislature intended in s. 4(1) of the Ordinance to confer power on the Minister to issue a detention order based on any of the above two grounds or for that matter, on both the grounds. It also seems clear to us that it was intended by legislature that there be a clear distinction between the first and the second limb of s. 4(1) of the Ordinance. Mr. Ranjit Singh, counsel for the appellant, submitted that if there appears to be any doubt as to the particular limb the Minister applied his mind to, or whether he applied his mind at all, the detainee must be given the benefit of the doubt. We agree with this submission. Our courts have consistently held that when it comes to interpreting powers of preventive detention, there is no room for giving these powers a liberal interpretation. When it comes to interpreting powers of preventive detention, it must be interpreted strictly.

In *Lee Gee Lam*'s case the Supreme Court also appraised the reasoning given in another case that is *Lim Thian Hok v. Minister of Home Affairs & Anor & Other Applications* [1993] 1 MLJ 214. The reasoning relates to what is intended in s. 4(1) of the Ordinance 1969. For purposes of clarifying the matter to be addressed the relevant portion in the *Lim Thian Hok*'s case is reproduced:

... it seems quite clear to me that what is intended in s. 4(1) of the Ordinance is to confer on the Minister the power to issue a detention order based on any one of two grounds which, by its very nature of expression, should be read disjunctively.

The first limb of the section seeks to allow the Minister to detain:

(a) a person who has acted in any manner prejudicial to public order (or, presumably social order in our society), which encompasses a whole gamut of variegated offences such as smuggling, running illegal lotteries, preaching religious heresy, or advocating communist or racist ideology, all of which do not necessarily involve violence; and

The second limb allows the Minister to detain:

(b) a person, if it is necessary for the suppression of violence or the prevention of crimes involving violence, obviously an appropriate provision for curbing gangsterism, gangland warfare and gang violence – which necessarily involve violence or the use of violence, as emphasized in the second limb.

Furthermore, the interpolation in s. 4(1) of the Ordinance, of the following words (underscored by me) '... it is *necessary that that person should be detained* or that it is necessary for ... *that that person should be detained* ...' (seemingly repetitive) shows a clear recognition by the legislature of the distinction between the first limb and second limb of the said section.

The two above grounds for detention in (a) and (b) are so distinct and different in specie one to the other, that reading them conjunctively does not make for grammatical sense or consistency in the flow of the language ... *There being nothing in the Ordinance requiring that the detention order should be in any particular form, the order should be so worded as to show, at least on its face, under which particular limb of s. 4(1) the detenu is being detained.* (emphasis added).

However it is also pertinent to mention, since counsel for the detenu has raised an arguement that the words used in the detention order does not provide the basis of the purported detention under the Act, that the second limb of s. 4(1) further contains two parts namely that if the Minister is to be satisfied that it is necessary (firstly) for the **suppression of violence** or (secondly) **for the prevention of crimes involving violence** that a person should be so detained the Minister shall make an order.

The judicial decision mentioned above indicates that in considering the detention order the court has to ascertain whether on the face of it the order was so vague such that it could be said that the Deputy Minister had not applied his mind properly to the particular circumstances of the case or such that it could be said that he had exercised his power of detention mechanically.

I find it necessary to repeat what was approved by the Supreme Court of the statement of the Judicial Commissioner in *Lim Thiam Hok*'s case where it was stated by the learned Judicial Commissioner that there is actually nothing in the Ordinance that requires that the detention order should be in any particular form. Nevertheless, it is to be ascertained whether on the face of it the Minister has invoked the relevant limb which would go to show whether he had addressed his mind properly and correctly.

The order itself is in Bahasa Malaysia but the order if translated, states that the Deputy Minister is satisfied that the person named in the order and against whom the order has to be made is to be detained with the object of preventing him from committing acts (perbuatan) of crime (or criminal acts) involving violence.

I am of the view that the structure or syntax of the provisions of s. 4 is such that it is not necessary that the detention order be crafted in such a way that it has to be literally repeated word for word what is in the section itself. The test at least is whether on the face of it the words are such that it could be conveyed to the detenu which part of the limb is being invoked. I find that the order as crafted and served on the detenu is capable of being understood as to which part of the second limb is being referred to.

Moreover the test of determining whether the Minister had not applied his mind mechanically is further to be ascertained from the grounds of detention which was furnished and which in any case was acknowledged to be received. The allegations of facts set out in the grounds disclose that the detenu, over the period that stretched from February 1999 to February 12 February 2000 (intermittently) had been engaged alongside others in acts using force and deploying use of certain instruments (kayu hoki, parang, besi, topi keledar) to inflict serious injury on certain individuals. These acts indicate that there was use of force which could be described as violent. The antithesis of violence is calmness, peace, rationality, as opposed to vehemence, unbridled use of force which is cruel or brutal. To prevent means not only to defend against but also to anticipate or to nip in the bud.

The allegation of facts upon which the grounds are constituted in my considered view bear the stamp of violence and the description of those alleged acts are specific enough to be understood as acts which fell within the scope of the second part of the second limb of s. 4(1) of Ord. 5/69 and are not in contradiction with the order itself.

In its totality I find that the order and the allegation of facts upon which the grounds of detention are constituted are within the scope of section 4(1) of Ord. 5/69.

However there is also another contention of the counsel of the detenu relating to the said s. 4(1) and the allegations of facts. Counsel uses the expression "the logic" of the situation that it is impossible to know when a person would commit a crime of violence and hence to prevent it and therefore the words used in the order does not support the prevention of crime of violence as envisaged by the Ord. 5/1969. This part of the submission of the counsel is actually interrelated to the third arguement raised by counsel. The third arguement concerns what is alleged to be the staleness of the allegation of facts upon which the grounds of detention have been constituted. In support of this counsel for the detenu relies on the decision in *Yit Hon Kit v. Minister of Home Affairs, Malaysia & Anor* [1988] 2 MLJ 638. In this case the application for *habeas corpus* was granted by the judge and an Editorial Note to the case indicates that an appeal that was filed to the Supreme Court was withdrawn.

In that case the learned judge, Edgar Joseph Jr. J (as he then was) detailed cases in respect of which the application of arts. 5(2) and 5(3) of the Constitution had been considered. In that case the failure to serve upon the detenu a copy of the detention order, the grounds thereof and the allegation of facts upon which it was based, "as soon as may be after the making thereof" was amongst the reasons for the granting of the writ.

What was particularly relied upon by counsel for the detenu in the present case however was the point taken in that case that there is another flaw in the process leading to the detention. This concerns the question whether the detaining authority may be justified in ordering the detention of a person in view of his past activities. Edgar Joseph Jr. J referred to various judicial decision in India that opined the following:

(a) Past activities should ordinarily be proximate in point of time to justify the detention order.

(b) With regard to long gaps between occurrences and the order of detention there is to be expected some proximity in time to provide a rational nexus between the incidents relied on and the satisfaction arrived at. Unexplained long delays will be fatal to the plea of subjective satisfaction.

With regard to this aspect of the submission of the counsel it has to be noted that the remarks of the learned judge in that case was also premised on the facts that there was an absence of an affidavit in opposition by the Deputy Minister upon whose subjective satisfaction the detention order was passed as well as the nature of the activities alleged of the detenu. In the present case the affidavit filed by the Deputy Minister in opposition of the application stated, *inter alia*, that on 5 February 2002 a report was received under s. 3(3)(c) of Ord. 5/1969. Paragraph 9 of the affidavit of the Deputy Minister states the following:

> 9. Merujuk kepada perenggan 22 dan 25(v) di dalam afidavit Pemohon saya sesungguhnya menafikan pengataan-pengataan di dalamnya dan menyatakan bahawa sesungguhnya saya telah menimbangkan dengan penuh teliti laporan lengkap penyiasatan yang dikemukakan oleh pihak Polis dan saya juga telah mengarahkan diri saya sepenuhnya terhadap fakta-fakta dan alasan-alasan untuk menahan Pemohon di bawah Seksyen 4(1) Ordinan tersebut. Seterusnya saya telah berpuashati bahawa Pemohon perlu ditahan di bawah Ordinan tersebut dan menyatakan bahawa sesungguhnya walaupun aktiviti Pemohon adalah sejak Februari 1999 hingga Februari 2000, pihak Polis hanya berjaya mengesan dan menangkap Pemohon pada 7.1.2002. Kelewatan tersebut juga adalah disebabkan pihak Polis memerlukan masa untuk menyiasat dengan teliti

> bagi memastikan bahawa sama ada Pemohon benar-benar ada terlibat dengan kegiatan jenayah kekerasan atau tidak. Saya juga sesungguhnya percaya bahawa Ordinan tersebut adalah terpakai dalam keadaan fakta-fakta tuduhan yang dibuat terhadap Pemohon.

The affidavit of the Deputy Minister states that he had given careful consideration to the report and had addressed his mind to the facts. He further stated that he was satisfied that although the activities of the detenu had started since February 1999 until February 2000 the police was only able to locate and arrest him on 7 January 2002. The delay was attributed to the police requiring time to investigate in detail in order to ascertain whether the detenu had been truly involved in the criminal activities involving violence.

It must also be in response to this statement that counsel has also contended that the explanation was inadequate as there was no explanation to indicate what activities the detenu had been engaged in during the period prior to the order of detention being made. According to counsel that period which was approximately two years did not show that the detenu had been engaged in any activity involving a crime of violence. In addition it is alleged that the affidavit did not disclose whether a criminal prosecution could have been sufficient in the circumstances of the case.

It is proposed firstly to address the submission of counsel on the so called "logic" of the section, that it is not possible to know when a person would commit an offence or the next act which could be said to be criminal in nature. The argument is that if it is not known when an act of crime is to be committed hence it is not possible to prevent the act from being committed.

To understand the word prevention it may be useful to refer to the words of Lord Finlay in the case of *R v. Halliday ex parte Zadig* [1917] AC 260 which to my mind is worth quoting despite the fact that it is to be noted that the legislation to be construed in that case was a subsidiary legislation which empowered the secretary of state to order the internment of any person of hostile origin or association. Although the statement is simple it describes succinctly what preventive detention is, that is, The measure is not punitive but precautionary" (at p. 269). Again I find further assistance in the observation of Lord Aitkinson in the same case where he stated (at p. 273):

> Preventive justice, as it is styled which consists in restraining a man from committing a crime he may commit but has not yet committed or doing some act injurious to members of the community which he may do but has not yet done, is no new thing in the laws of England.

Here in the Federation of Malaysia, the term "preventive detention" is found in art. 151 cl. (1) which article now appears in Part XI which is subtitled "Special Powers Against, Subversion, Organised Violence and Acts and Crimes Prejudicial to the Public and Emergency Powers." "Preventive Detention" is a subject matter which is specifically itemized (item 3(c)) in List 1 of the Ninth Schedule to the Federal Constitution, thus enabling the Executive authority and the Parliament to enact legislation on the same. Preventive detention legislation has been in force and enforced even before the Federation of Malaya Constitution 1957 was promulgated.

With regard to the submission of the learned counsel that it is difficult to anticipate what a future conduct of an individual will be or whether a criminal act may be anticipated, I find it worthwhile to refer to a decision in India in the case of *M. Mohd Sulthan v. Jr. Secy to Govt. of India. Finance Dept.* [1990] AIR SC 2222. This is a case involving the application of the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act 1974 (or COFEPSA Act 1974). This Act is a law relating to preventive detention and therefore subject to limitations imposed by art. 22(5) of the Constitution of India. I would like to refer to a specific contention raised in that case which runs along the same vein as in the case before me and this is found in the judgment of SC Agrawal J at p. 2225 in which he has addressed it as follows in the context of the facts of that case:

> Shri Karthikeyan has next contended that there was no necessity to pass an order for the detention of the petitioner because except the solitary incident mentioned in the grounds of detention involving the recovery of seven gold bars from the person of the petitioner there is no reference in the grounds of detention to any antecedent activity involving smuggling of goods by the petitioner. It is urged that a single incident could not afford the basis for arriving at the satisfaction that the petitioner might repeat such acts in the future and it was necessary to detain him in order to prevent him from doing so. We are unable to agree with this contention. An order for preventive detention is founded *on a reasonable prognosis of the future behaviour of a person based on his past conduct judged in the light of the surrounding circumstances. Such past conduct may consist of one single act or of a series of acts. It must be of such a nature that an inference can reasonably be drawn from it that the person concerned would be likely to repeat such acts as to warrant his detention.* (*Debu Mehto v. The State of West Bengal* [1974] 4 SCC 135: (AIR [1974] SC 816)). The question which, therefore, needs to be considered is whether from the past conduct of the petitioner as set out in the grounds of detention it could reasonably be inferred that the petitioner would be likely to repeat such acts in the future. (emphasis added).

The repeated acts of the detenu formed the basis of the Deputy Minister's satisfaction in pursuance of which the order under s. 4(1) was issued. This is evidenced by paras. 6 and 7 of the affidavit in opposition of the application of the Deputy Minister where it is stated:

> 6. Daripada laporan lengkap penyiasatan yang berkaitan dengan aktiviti Pemohon yang telah saya terima mengenai tangkapan dan penahanan Pemohon, saya telah berpuashati bahawa Pemohon adalah ketua kumpulan penjenayah yang telah melakukan kegiatan jenayah yang melibatkan kekerasan dan bergiat cergas di sekitar kawasan Sri Manja, Kampung Sentosa Sepakat, Taman Kanagapuram, Jalan Klang Lama dan Rumah Panjang Kawasan "C", Pantai Dalam Kuala Lumpur dan adalah perlu Pemohon ditahan dengan tujuan hendak mencegah beliau daripada melakukan perbuatan jenayah yang melibatkan kekerasan. Seterusnya saya telah membuat satu Perintah Tahanan di bawah Seksyen 4(1) Ordinan Darurat (Ketenteraman Dan Mencegah Jenayah), 1969 bertarikh 7.3.2002 yang mengarahkan supaya Pemohon ditahan bagi tempoh 2 tahun mulai dari 7.3.2002 (selepas ini dirujuk sebagai "Perintah Tahanan tersebut") di Pusat Pemulihan Akhlak Simpang Renggam, Johor (selepas ini dirujuk sebagai "PPA Simpang Renggam"). Satu salinan Perintah Tahanan tersebut adalah sepertimana yang dilampirkan dan ditandakan sebagai ekshibit "LS-1" di dalam afidavit Pemohon.
>
> 7. Di atas arahan saya, pegawai saya bernama MASILA BINTI YA'KUB telah menyediakan Alasan-Alasan yang atasnya saya membuat Perintah Tahanan tersebut dan Tuduhan-Tuduhan fakta yang di atasnya Perintah Tahanan tersebut diasaskan. Salinan Alasan-Alasan dan Tuduhan-Tuduhan fakta tersebut adalah sepertimana yang dilampirkan dan ditandakan sebagai ekshibit "LS-2" di dalam affidavit Pemohon. Saya sesungguhnya percaya bahawa Alasan-Alasan dan Tuduhan-Tuduhan fakta tersebut telah diterangkan dan diserahkan kepada Pemohon pada tarikh yang sama Perintah Tahanan tersebut diserahkan kepada beliau.

This does not however conclude the matter. Counsel has raised two other matters concerning the allegations of facts constituting the grounds of detention. One matter questions the adequacy of the grounds and more particularly that it was not shown whether prosecution has been considered. Before endeavouring to address this matter it is necessary at this junction to mention certain other provisions in the Federal Constitution as well as Ord. 5/1969. Article 151 cl. 3 has specifically circumscribed that the article "does not require any authority to disclose facts whose disclosure would in its opinion be against national interest."

However learned counsel also relied on the decision in *Morgan a/l Perumal*'s case, *supra*; where the Court of Appeal held that generally detention orders are issued based on past criminal activities but those activities must be proximate to the date of the detention order to justify its validity. Justice Shaik Daud JCA in that case observed:

> It is also contended that there was a long delay or a large gap between the dates of the criminal activities alleged against the appellant and the date of the detention order. From the list of allegations upon which the Deputy Minister based the detention order, it would appear that all the alleged criminal activities occurred from August 1993 until about April 1994 but the detention order was only issued in March 1996. There is, therefore, a gap of some two years. No one sought to explain this long delay. While it is not disputed that generally detention orders are issued based on past criminal activities but those activities must be proximate to the date of the detention order to justify its validity. In *Yeap Hock Seng @ Ah Seng v. Minister for Home Affairs & Ors*. [1975] 2 MLJ 279, there was a similar delay of some four and a half months. Abdoolcader J (as he then was) commented (at p. 283) that:
>
> > These past activities should, however, ordinarily be proximate in point of time to justify the detention order.
>
> In *Yit Hon Kit v. Minister of Home Affairs, Malaysia & Anor* [1988] 2 MLJ 638, when the criminal activities alleged were in the years 1983 and 1984 while the detention order was issued in February 1986, Edgar Joseph Jr J (as he then was) at p. 647 held that:
>
> > Accordingly, I hold that the criminal activities alleged against the applicant are too remote in point of law to justify the making of the detention order.
> >
> > In the present case, as mentioned earlier, the criminal activities of the appellant were some two over years from the date of the detention order. In the absence of any explanation, we would also hold that they are far too remote to justify the detention.

I find that there are two aspects of the case which need particular mention. Firstly, in that case there appeared to be no reference to the provisions of ss. 7C and 7D of Ord. 5/1969 and the effect if any although those provisions were already in force since 24 August 1989. Secondly the judgment clearly indicated that no explanation whatsoever was afforded with regard to the question of the remoteness that was alleged of the criminal activities.

Reference may also be made to the decision of the Supreme Court in *Chua Teck v. Menteri Hal Ehwal Dalam Negeri* [1990] 1 MLJ 104, in an appeal from the decision of the High Court. The head notes of the case before the Supreme Court are as follows:

> In this case, the respondent had been detained pursuant to a detention order under s. 6(1) of the Dangerous Drugs (Special Preventive Measures) Act 1985 ('The Act'). The Deputy Minister who signed the detention order had stated that he was satisfied that the respondent had associated himself in activities relating to or involving drug trafficking and that it was necessary that the respondent be detained. The Advisory Board later reviewed the respondent's case and submitted a report to the Deputy Minister, recommending an extension of the detention order. The Deputy Minister considered the reports and information relating to the conduct and activities of the respondent and being satisfied that it was necessary in the interest of public order for the detention order to be extended, extended it for a further period of two years 'on the same grounds as the order was originally made'. An application was made for *habeas corpus* and it was contended:
>
> (a) the detention was not lawful because the various allegations of fact were stale and remote in point of time; and
>
> (b) the Deputy Minister in making the detention order had contravened s. 11(4) of the Dangerous Drugs (Special Preventive Measures) Act 1985.
>
> The learned judge who heard the application concluded that since the report of the Advisory Board which contained a special recommendation for the extension of the respondent was put before the Deputy Minister, the Deputy Minister had considered extraneous matters which the law did not contemplate he should consider and this made his decision bad in law. He therefore ordered the release of the respondent. (See [1989] 3 MLJ 118.) The appellant appealed.

In allowing the appeal the Supreme Court had reversed the decision of the High Court on the second ground of contention which is not relevant for the purposes of the present case before me, but of interest to note however is the first ground. Hashim Yeop A. Sani CJ (Malaya) (as he then was) dealt with the first ground as follows:

> The first ground advanced on behalf of the respondent was answered properly and correctly by the learned judge at p. 23 of his grounds of judgment. The question of staleness or remoteness of the allegations of fact goes to the question of sufficiency or relevancy of the facts, an inquiry outside the powers of the court. There is hardly any need to refer to any authority for this.

At the High Court level Justice LC Vohrah J (as he then was) had also considered the question of staleness on remoteness which formed the first ground of challenge as follows:

> In my view the question of staleness or remoteness forming the first ground of challenge goes to the question of sufficiency or relevancy of the facts, an enquiry upon which the court cannot embark as it is based on the subjective satisfaction of the Minister who in making the first order of detention in the interest of public order under s. 5(1) of the Act, can take into account the applicant's past association 'with any activity in relation to or involving the trafficking in dangerous drugs' (See *Ee Kim Huan v. Inspector-General of Police & Ors* in Seremban Criminal Application No. 44/(54)-59-88).

The observation of their Lordships Hashim Yeop A. Sani CJ and LC Vohrah J cited above encapsulates the judicial approach that has been applied in relation to the question of the Minister's satisfaction which approach had already started in *Karam Singh v. Menteri Hal Ehwal Dalam Negeri Malaysia* [1969] 2 MLJ, 129. The approach taken in this latter case has also been applied in *Yeap Hock Seng @ Ah Seng v. Minister for Home Affairs Malaysia & Ors* [1975] 2 MLJ 279 and again the approach was affirmed by the Supreme Court in the case of *Minister For Home Affairs, Malaysia & Anor v. Karpal Singh* [1988] 3 MLJ 29. While two of the three cases mentioned above concern the Internal Security Act 1960 (ISA 1960). *Yeap Hock Seng*'s case pertain to Ord. 5/69. Section 4 of the Ord. 5/69 is similar to s. 8 of ISA 1960. Presently both legislation contain the following provisions:

> **ISA 1960**
>
> 8B. Judicial review of act or decision of Yang di-Pertuan Agong and Minister
>
> (1) There shall be no judicial review in any court of, and no court shall have or exercise any jurisdiction in respect of, any act done or decision made by the Yang di-Pertuan Agong or the Minister in the exercise of their discretionary power in accordance with this Act, save in regard to any question on compliance with any procedural requirement in this Act governing such act or decision.
>
> (2) The exception in regard to any question on compliance with any procedural requirement in subsection (1) shall not apply where the grounds are as described in section 8A.
>
> 8C. Interpretation of "judicial review".
>
> In this Act, "judicial review" includes proceedings instituted by way of:
>
> (a) an application for any of the prerogative orders of mandamus, prohibition and *certiorari*;

(b) an application for a declaration or an injunction;

(c) a writ of *habeas corpus*; and

(d) any other suit, action or other legal proceedings relating to or arising out of any act done or decision made by the Yang di-Pertuan Agong or the Minister in accordance with this Act.

Section 7C & 7D of Ord. 5/1969

7C. Judicial review of act or decision of Yang di-Pertuan Agong and Minister.

(1) There shall be no judicial review in any court of, and no court shall have or exercise any jurisdiction in respect of, any act done or decision made by the Yang di-Pertuan Agong or the Minister in the exercise of their discretionary power in accordance with this Ordinance, save in regard to any on compliance with any procedural requirement in this Ordinance governing such act or decision.

(2) The exception in regard to any question on compliance with any procedural requirement in subsection (1) shall not apply where the grounds are as described in section 4C.

7D. Interpretation of "judicial review".

In this Ordinance, "judicial review" includes proceedings instituted by way of:

(a) an application for any of the prerogative orders of mandamus, prohibition and *certiorari*;

(b) an application for a declaration or an injunction;

(c) a writ of *habeas corpus*; and

(d) any other suit, action or other legal proceedings relating to or arising out of any act done or decision made by the Yang di-Pertuan Agong or by the Minister in accordance with this Ordinance.

In the present proceedings the affidavit filed in opposition by the Deputy Minister states *inter alia*:

Seterusnya saya telah berpuashati bahawa Pemohon perlu ditahan di bawah Ordinan tersebut dan menyatakan bahawa sesungguhnya walaupun aktiviti Pemohon adalah sejak Februari 1999 hingga Februari 2000, pihak Polis hanya berjaya mengesan dan menangkap Pemohon pada 7.1.2002. Kelewatan tersebut juga adalah disebabkan pihak Polis memerlukan masa untuk menyiasat dengan teliti bagi memastikan bahawa sama ada Pemohon benar-benar ada terlibat dengan kegiatan jenayah kekerasan atau tidak. Saya juga sesungguhnya percaya bahawa Ordinan tersebut adalah terpakai dalam keadaan fakta-fakta tuduhan yang dibuat terhadap Pemohon.

In the case of *Abdul Rahman Maidin v. Timbalan Menteri Dalam Negeri Malaysia & Ors.* [2003] 3 CLJ 8 the Court of Appeal accepted the explanation of the Deputy Minister where he affirmed that the delay was due to the length of time it took to investigate into the appellant's past activities as a "legitimate and acceptable" explanation. Siti Norma Yaakob JCA (as she then was) in referring to Abdoolcader's J decision in *Yeap Hock Seng*'s case where the learned judge in turn had referred to another decision in India that of *Sahib Dugel v. Union of India* AIR [1966] SC said:

> It would appear that the length of the time calculated in the two cases cited refers to the length of time the detainee was kept in custody before the detention was issued. It did not refer to the length of time the last act of criminal activities was known to the date the detention under was made.

In the present case before me the allegations of facts upon which the Minister's satisfaction was based indicated criminal activities involving violence in February 1999, seven months later in September 1999 there were two incidents and five months later in February 2000 two other recurring incidents.

The detention order was served above two years later. It is noted that the detenu was arrested within police precincts. The Minister has explained the reason for the delay and the question is whether such delay is unreasonable having regard to the nature of activities that was to be investigated. In the light of the observation in *Abdul Rahman*'s case *supra* I find that the Court of Appeal has recognized that some delay in taking action in cases of preventive detention may be inevitable. A distinction could be drawn between the delay in making of an order of detention under preventive detention legislation and the delay in complying with the procedural safe grounds limitation set forth in the Constitution. In view of the explanation of the Minister, I do not find that it must necessarily give rise to an inference of insufficiency of material for subjective satisfaction or that it was not genuinely reached. The question whether delay in passing detention orders vitiates the detention must depend upon facts and circumstances and the absence of any convincing explanation.

I would have to add however that with the inception of s. 7C and 7D of Ord. 5/1969, I would be enjoined from embarking into further inquiry on the adequacy or otherwise of the reasons given by the Minister.

In *Karpal Singh*'s case *supra*, Abdul Hamid Acting LP (as he then was) in delivering the judgment of the Supreme Court drew the distinction between grounds of detention stated in the detention order and the allegation of facts supplied to the detainee. There it was determined that whilst grounds of detention stated in the detention order are open to challenge or judicial review

if alleged to be not within the scope of the enabling legislation, the allegations of fact upon which the subjective satisfaction of the Minister was based are not.

I now turn the third argument submitted by counsel for the defence. The third argument raised by counsel alleges that the affidavit filed in opposition by the Deputy Minister has not stated whether in the circumstances of the case, a criminal prosecution would suffice. This argument is premised on what has been said by Islam J in the Indian case of *Hemlata Kautilah Shah v. State of Maharashtra & Anor* [1982] SCC (Cri) 16. In that case the petitioner was detained by the State of Maharashtra under s. 3(1) of the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act 1974. Counsel for the detenu relies on the following passage in the case:

> 20. The next point urged by Mr. Ram Jethmalani is that in the instant case, the proper course for the Government was to prosecute and convict the detenu for the offence, if any, for violation of the provisions of the Customs Act. In support of his contention he cites a decision of this Court in *K.M. Chokshi v. State of Gujarat.*[4] In that decision, the Court after reviewing a number of cases summarized the law as follows: (SCC p. 18, para 8)
>
> > The ordinary criminal process is not to be circumvented or short-circuited by ready resort to preventive detention. But, the possibility of launching a criminal prosecution is not an absolute bar to an order of preventive detention. Nor is it correct to say that if such possibility is not present to the mind of the detaining authority the order of detention is necessarily bad. However, the failure of the detaining authority to consider the possibility of launching a criminal prosecution may, in the circumstances of a case, lead to the conclusion that the detaining authority had not applied its mind to the vital question whether it was necessary to make an order of preventive detention. Where an express allegation is made that the order of detention was issued in a mechanical fashion without keeping present to its mind the question whether it was necessary to make such an order when an ordinary criminal prosecution could well serve the purpose, the detaining authority *must satisfy the Court that that question too was borne in mind before the order of detention was made. If the detaining authority fails to satisfy the Court that the detaining authority so bore the question in mind the Court would be justified in drawing the inference that there was no application of the mind by the detaining authority to the vital question whether it was necessary to preventively detain the detenu.*

21. The rule laid down is that a *prosecution or the absence of it is not an absolute bar to an order of preventive detention*; the authority may prosecute the offender for an isolated act or acts of an offence for violation of any criminal law, but if it is satisfied that the offender has a tendency to go on violating such laws, then there will be no bar for the State to detain him under a Preventive Detention Act in order to disable him to repeat such offences. What is required is that the detaining authority is to satisfy the Court that it had in mind the question whether prosecution of the offender was possible and sufficient in the circumstances of the case. *In some cases of prosecution it may not be possible to bring the culprit to book as in case of a professional bully, a murderer or a dacoit, witnesses do not come forward to depose against him out of fear, or in case of international smuggling, it may not be possible to collect all necessary evidence without unreasonable delay and expenditure to prove the guilt of the offender beyond reasonable doubt.*

22. In the instant case it has been submitted by Mr. Jethmalani that on the facts of this case, the prosecution under the ordinary law would have been sufficient; resort to preventive detention on the face of it was manifestly unreasonable. In the counter-affidavit it has been stated by the detaining authority that it was aware that the detenu was being prosecuted under the ordinary law; but it was satisfied that the prosecution under the ordinary law was not sufficient for preventing the detenu from indulging in similar activities in future. This statement of the authority satisfies the requirement of the rule laid down by this Court in the *Chokshi* case.[4]

Before dealing with this point there is another case furnished by the counsel that should be mentioned that is *Murugan s/o Palannisamy & Ors. v. Deputy Minister of Home Affairs & Ors.* [2000] 1 CLJ 147. In that case the applicant had been ordered by the Deputy Minister of Home Affairs to be detained for two years under a detention order issued under s. 4(1) of Ord. 5/69. In the application for a writ of *habeas corpus* two main grounds were put before the learned judge namely (i) whether by reference to the affidavit in reply of the Deputy Minister filed in opposing the application it is shown that he had failed to apply his mind properly and correctly the appropriate limb of s. 4(1) or Ord. 5/69 when issuing the detention order and (ii) whether by reference to the affidavit it is shown that there had been a failure by him as a detaining authority in the circumstances of the case to consider and state the possibility of launching a criminal prosecution against the applicant.

It is to be noted that the applicant in *Murugan*'s case is alleged to have committed only one known offence under the Penal Code. The learned judge ruled, *inter alia*, as follows:

I am of the view that the ordinary criminal process is not to be circumvented or short circuited by ready resort to preventive detention. It is accepted that in some cases it may not be possible to bring the offender to book on account that witnesses do not come forward to depose against him out of fear or it may not be possible to collect all the necessary evidence without unreasonable delay and expenditure to prove the guilt of the offender beyond reasonable doubt. However, the failure of the detaining authority to consider and state the possibility of launching a criminal prosecution may, in the circumstances of the case lead to a conclusion that the detaining authority had not applied his mind to the vital question whether it was necessary to make such an order when an ordinary criminal prosecution could well serve the purpose. I am of the view that if the detaining authority fails to satisfy the court that the detaining authority so bore the said question in mind, the court would be justified in drawing the inference that there was no application of the mind of the detaining authority to the vital question whether it was necessary to preventively detain the detenu. I find support of this argument by reference to the case of *Hemlata v. State of Maharashtra* AIR [1982] SC8 wherein in that case it was held, *inter alia*, that the aspect relating to possibility of criminal prosecution must also be borne in mind while ordering detention. I would also venture to state in the circumstances of this case and bearing in mind there is only one allegation of fact relating to the one offence alleged to have committed by the applicant could lead to an inference that there was *mala fide* on the part of the detaining authority in ordering the detention of the applicant.

With due respect the cases cited by learned counsel fall into the categories of cases where the court has found that the detention order itself is defective *ex facie* where it is suggested that the Minister has not applied his mind to the circumstances of the case. Article 151 of the Federal Constitution accords certain minimum protection to protect detainees against possible abuse of the wide powers of preventive detention under legislation enacted pursuant to arts. 149, 150. The detaining authority must inform the detainees of the grounds of his detention and the allegation of facts on which the order is based and must give him an opportunity of making representations against the order.

I also find that in both the cases mentioned above the facts that were alleged could have fallen squarely with the provisions of a Customs Act and Penal Code respectively.

In dealing further with this particular argument, I find a need to refer to another Indian case, bearing in mind some reminders when Indian authorities are cited. In the case of *Dorai Manickam v. R* [1936] MLJ 261, the Court of Appeal, Straits Settlements, was dealing with an appeal where several authorities both Indian and English were referred to Adrian Clark J in the course of delivering judgment said:

> In support of his submission the Learned Solicitor General cite many decisions of the English and of the Indian courts. We are always prepared to study such authorities with interest and with respect but, with the exception of decisions by the Judicial Committee of the Privy Council and, in some cases of the House of Lords, these authorities are not binding on us. We must in any event, before accepting them, be satisfied that they deal with the same problem as that which we are called upon to solve in the case in which these authorities are cited to us.

In *Yeap Hock Seng*'s case *supra*, Agar Abdoolcader J in referring to Indian authorities dealing with the subject matter of preventive detention legislation observed:

> Our Constitution and the laws providing for preventive detention have been primarily drawn from Indian sources, and accordingly decisions of the highest tribunal in India, the Supreme Court of India, and indeed also of the High Courts of her several States, are of great persuasive authority here upon the borrowed provisions and will be entitled to great weight in interpreting and considering the relevant local statutory counterparts, subject of course to such modifications as may be necessary owing to variation in language or context. The position would therefore appear to be that where there is a dearth of local authority, the Indian decisions are entitled to the greatest respect and will normally be followed unless the court has cause to disagree with the reasoning of any such decision.

However, on the specific points of the subjective satisfaction of the Minister, I find that the parameters of judicial review which are now further proscribed by ss. 7C and 7D are still guided by the views of their Lordships Ong Hock Thye CJ (Malaya) (as he then was) and Suffian FJ (as he then was) as well as the then Lord President Azmi LP in *Karam Singh*'s case where in all three judgments the English approach expounded in *Liversidge v. Anderson* [1942] AC 206 was applied. Gill and Ali FJJ also gave concurring judgments. In a nutshell it is expressed in the judgment of Suffian FJ as follows:

> ... in my opinion, it is not for a court of law to pronounce on the sufficiency, relevancy or otherwise of the allegations of fact furnished to him. The discretion whether or not the appellant should be detained is placed in the hands of the Yang di-Pertuan Agong acting on Cabinet advice. Whether or not the facts on which the order of detention is to be based are sufficient or relevant, is a matter to be decided solely by the executive. In making their decision, they have complete discretion and it is not for a court of law to question the sufficiency or relevance of these allegations of fact.

The third argument raised by counsel detenu also warrants a consideration of the differences between punitive detention and preventive detention. In the absence of an authoritative decision in Malaysia, and since *Hemlata*'s case has been cited by counsel I would like to refer to the Indian case of the *State of Punjab v. Sukhpal Singh* [1990] AIR 225. Although the detention in this case was effected pursuant to the National Security Act 1980 where the detenu was detained with a view to preventing him from indulging in activities prejudicial to the security of the state and maintenance of public order the judgment of KN Saikia J, contained observation relevant to the question whether criminal prosecution is to be considered before resorting to preventive detention.

For the reason that the matter has been explained with such clarity, I wish to refer to the following passages:

> A clear distinction has to be drawn between preventive detention in which anticipatory and precautionary action is taken to prevent the recurrence of apprehended events, and punitive detention under which the action is taken after the event has already happened. It is true that the ordinary criminal process of trial is not to be circumvented and short-circuited by apparently handy and easier resort to preventive detention. But the possibility of launching a criminal prosecution cannot be said to be an absolute bar to an order of preventive detention. Nor would it be correct to say that if such possibility is not present in the mind of the detaining authority the order of detention would necessarily be bad. The failure of the detaining authority to consider the desirability of launching a criminal prosecution before ordering preventive detention may in the circumstances of a case lead to the conclusion that the detaining authority had not applied its mind to the important question as to whether it was necessary to make an order of preventive detention but such is not the case here. In this regard one has to bear in mind the relevant facts and circumstances of a case including the time and place concerned. In this view we find support from the decision in *Fazal Ghosei v. State of U.P.* AIR [1987] SC 1877: [1987] 3 SCR 471, wherein it was pointed out that the Act provided for preventive detention which was intended where it was apprehended that the persons might act prejudicially to one or more considerations specified in the statute, and that preventive detention was not intended as a punitive measure for curtailment of liberty by way of punishment for the offence already committed. Section 3 read with Section 14A of the Act clearly indicated that the power of detention thereunder could be exercised only with a view to preventing a person from acting in a manner which might prejudice any of the situations set forth in the Section. To apply what was said in *Rex v. Halliday, Ex parte Zadig* [1917] AC 260, one of the most obvious means of taking precautions against dangers such as are enumerated is to impose some restriction on the freedom of movement of persons whom there may be any reason to suspect of being disposed to commit what is enumerated in s. 3 of the Act. No crime is charged. The question is whether

a particular person is disposed to commit the prejudicial acts. The duty of deciding this question is thrown upon the State. The justification is suspicion or reasonable probability and not criminal charge which can only be warranted by legal evidence. It is true that in a case in which the liberty of such person is concerned we cannot go beyond natural construction of the statute. It is the duty of this Court to see that a law depriving the person of his liberty without the safeguards available even to a person charged with crime is strictly complied with. We have, however, to remember that individual liberty is allowed to be curtailed by an anticipatory action only in interest of what is enumerated in the statute.

9. In actual practice the grounds supplied operate as an objective test for determining the question whether a nexus reasonably exists between grounds of detention and the detention order or whether some infirmities had crept in. A conjoined reading of the detention order and the grounds of detention is therefore necessary. It is, as was held in *Ujagar Singh v. State of Punjab*, AIR [1952] SC 350: [1952] SCR 756, largely from prior events showing tendencies or inclinations of a man that inference can be drawn whether he is likely in future to act in a prejudicial manner. But such conduct should be reasonably proximate and should have a rational connection with the conclusion that the detention of person is necessary. The question of relation of the activities to the detention order must be carefully considered. Though the possibility of prosecution being launched is not an irrelevant consideration, failure to consider such possibility would not vitiate the detention order. In *Haradhan Saha v. State of West Bengal* [1975] 3 SCC 198: (AIR [1974] SC 2154) the Court did not lay down that possibility of a prosecution being launched was an irrelevant consideration, not to be borne in mind by detaining authority but it laid down that the mere circumstance that a detenu was liable to be prosecuted would not by itself be a bar to the making of an order of preventive detention. It did not follow therefore that failure to consider the possibility of criminal prosecution being launched could ever lead to the conclusion that a detaining authority never applied its mind and the order of detention was therefore bad. Is it correct to say that if such possibility was not present in the mind of the detaining authority, the order of the detention is necessarily bad? Unless it clearly appears that preventive detention is being resorted to as the line of least resistance where criminal prosecution would be the usual course, no fault can be found with it. What is to be seen is whether the detaining authority has applied its mind or not to the question whether it was necessary to make preventive detention. In the instant case there is evidence of application of mind. The proximity between the date of commission of an offence and of detention order cannot also be said to be absent in this case. As we have already seen the power of preventive detention is qualitatively different from punitive detention. The power of preventive detention is precautionary power exercised reasonably in anticipation and may or may not relate to an offence. It cannot be considered to be a parallel

proceeding. The anticipated behaviour of a person based on his past conduct in the light of surrounding circumstances may provide sufficient ground for detention. It cannot be said that the satisfaction of the detaining authority on the basis of his past activities that if the detenu were to be left at large he would indulge in similar activities in future and thus act in a manner prejudicial to the maintenance of public order etc. shall not be based on adequate materials. Public safety ordinarily means security of the public or their freedom from danger. Public order also implied public peace and tranquillity.

The High Court under art. 226 and Supreme Court under art. 32 or 136 do not sit in appeal from the order of preventive detention. But the court is only to see whether the formality as enjoined by art. 22(5) had been complied with by the detaining authority, and if so done, the court cannot examine the materials before it and find that the detaining authority should not have been satisfied on the materials before it and detain the detenu. In other words, the Court cannot question the sufficiency of the grounds of detention for the subjective satisfaction of the authority as pointed out in *Ashok Kumar v. Delhi Administration*, AIR [1982] SC 1143: [1982] 3 SCR 707. Those who are responsible for the national security or for the maintenance of public order must be the judges of what the national security or public order requires. Preventive detention is devised to afford protection to society. The object is not to punish a man for having done something but to intercept before he does it and to prevent him from doing. The justification for such detention is suspicion or reasonable probability and not criminal conviction which can only be warranted by legal evidence. Thus, any preventive measures even if they involve some restraint or hardship upon individuals, do not partake in any way of the nature of punishment, but are taken by way of precaution to prevent mischief to the State. There is no reason why executive cannot take recourse to its powers to preventive detention in those cases where the executive is genuinely satisfied that no prosecution can possibly succeed against the detenu because he has influence over witnesses and against him no one is prepared to depose. However, pusillanimity on the part of the executive has to be deprecated and pusillanimous orders avoided.

11. Following *Hemlata* (AIR [1982] SC 8) *(supra)* it could be said that in this case of prosecution it may not be possible to bring home the offender to book as witnesses may not come forward to depose against him out of fear, or it may not be possible to collect all necessary evidence without unreasonable delay and expenditure to prove the guilt of the offender beyond reasonable doubt.

12. Considering the relevant facts and circumstances including the time and place, the contents of the detention order and the allegations in the grounds of detention in this case, we are of the view that non-registration of any criminal case could not be said to have shown non-application of mind or absence of subjective satisfaction on the part of the detaining authority.

The decision of Abdoolcader J in *Yeap Hock Seng*'s case *supra* again explains the judicial approach succinctly as follows:

> ... It is, of course, settled law that the subjective determination of the Minister is not justiciable (*Karam Singh v. Menteri Hal Ehwal Dalam Negeri, Malaysia* [1969] 2 MLJ 129; *Sadhu Singh v. The Delhi Administration* AIR [1966] SC 91). The courts have consistently declined to review the exercise of ministerial discretion when its validity is impugned in *habeas corpus* proceedings (*Liversidge v. Anderson* [1942] AC 206; *Greene v. Secretary of State for Home Affairs* [1942] AC 284). The court cannot be invited to undertake an investigation into the sufficiency of the matters upon which the satisfaction of the Minister purports to be grounded but can examine the grounds disclosed by the Minister to see they are relevant to the object which the Ordinance prescribes. In proceedings such as these the court does not sit in appeal against the decision of the Minister regarding materials on which the detention order was made. The court does not examine the adequacy or truth of these materials and cannot interfere with the decision on the ground that if the court had examined them it would have come to a different conclusion.
>
> The burden of proving lawful justification for the detention lies on the respondents. This they do by relying on the detention order which must be made in the exercise of a valid legal power, in this case s. 4(1) of the Ordinance. Once this is shown it is for the detenu to show that the power was exercised *mala fide* or improperly for a collateral or ulterior purpose in fraudem legis (*Karam Singh* [1969] 2 MLJ 129; *Aminah v. Superintendent of Prison, Pengkalan Chepa Kelantan* [1968] 1 MLJ 92). The concept of subjective satisfaction of the Minister would be a sufficient justification for the detention unless the detenu can show that the power vested in the Minister to make the order with regard to him has been exercised *mala fide* or improperly – resolving into a position so felicitously put by Remfree J, in *Gitendranath Ghosh v. Chief Secretary to the Government of Bengal* ILR 60 Cal 364 to the effect that 'although the forms of law have been observed there has been a fraud upon the Act or an abuse of the powers given by the Legislature'.

Further on the learned judge also observed:

> It is my considered view that the object and ambit of the Ordinance is such and the purposes specified in s. 4(1) so wide as to negate any right in the applicant in the circumstances of his case to demand that the grave question of his guilt or innocence on the tentative charge of murder should be left to the court and the jury-box as the sanctuary of his life and liberty and not submerged in the amplitude of preventive detention on the basis of executive discretion and satisfaction conceived in the mind of the Minister or perhaps animated in his breast within the purview of the prescribed statutory provision on relevant grounds. Mere circumvention of the ordinary process of law cannot

by itself amount to *mala fides* as otherwise this would in most cases virtually result in rendering moribund and impotent the laws legally enacted to provide for preventive detention for specified purposes.

There are two other matters which I should perhaps briefly touch upon. The first is that counsel for the applicant seeks to contend in his final reply that the charge on which the applicant was originally arrested was a simple case of murder and should have been determined under the ordinary law applicable, namely, the Penal Code. However, the grounds on which the order is based and the allegations of fact on which it is made are of a broader spectrum and clearly state that the applicant is an active member of a group of inshore fishermen at Kuala Kurau and has taken part in criminal activities involving violence in a manner prejudicial to public order and in several fights with trawler fishermen in the course of which two trawler fishermen were killed on 27 March 1975. This, therefore, is not a stray or simple case of murder as, adopting the observations of Chandrachud J, in delivering the judgment of the Supreme Court of India in *Abdul Aziz* AIR [1973] SC 770, such an incident in the context of the applicant's activities as set out in the grounds and allegations of fact has serious repercussions not merely on law and order but also on public order.

It is noted that the judgment of Steve Shim CJ (Sabah and Sarawak) in the case of *Mohd Ezam Mohd. Noor v. Ketua Polis Negara and Other Appeals* [2002] 4 CLJ 309 has maintained the subjective test applicable to s. 8 of the ISA 1960 and that section is very similar to s. 4 of Ord. 5/1969.

In the present case before me five incidents have been cited as constituting allegations of facts upon which the Minister's satisfaction is based. It been urged upon the court that witnesses could have been obtained to testify or to depose against the detenu. The decision in *Hemlata*'s case itself recognized that even in some cases where prosecution could be considered it may not be possible to bring an offender to book as witnesses may not come forward out of fear or there may be long and unreasonable delay, and in the meanwhile the offender may still be at large to unleash further whatever undesirable activities which are disruptive of peace and tranquility.

Counsel's argument may lead to the situation that another precondition has to be stipulated, namely, that the detaining authorities is to furnish a further ground to state that it is satisfied that criminal prosecution has been considered and determined to be not feasible. It is also an invitation to the court to rewrite the legislation in substance and to inquire into investigation papers.

Having considered the arguments as aforesaid, I have come to the conclusion that the order of detention is not only not defective *ex facie* but also not invalid. The application therefore fails and the writ is refused.